In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1099

ROBERT ROCCO RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue presented here is whether the prosecutor improperly commented on the evidence during his summation.

After a jury trial with Frank Pizzi in the United States District Court for the District of New Jersey, petitioner and Pizzi were convicted of having used extortionate means to collect an extension of credit and of having conspired to do so in violation of 18 U.S.C. 894. Petitioner and Pizzi each received three year sentences. The court of appeals affirmed (Pet. App. A).

1. On January 5, 1970, one Robert Roy Russo (no relation to petitioner) had a conversation with one John Renyun in a Nutley, New Jersey, bar (Tr. 27). Russo stated that he had financial problems. When Renyun

offered to help, Russo said he needed $200. Renyun instructed Russo to meet him the next night at a bar in Bloomfield, New Jersey (Tr. 64-65).

The following night, January 6, 1970, Russo met Renyun at the bar, where Renyun introduced him to petitioner and co-defendant Pizzi (Tr. 27). Pizzi told Russo, "I heard you need two hundred dollars." Russo replied affirmatively. After telling Russo that he could get the money, Pizzi turned to petitioner and asked, "Should we give him a shot?". Petitioner said "yes" and handed $200 to Pizzi, who in turn gave it to Russo. At petitioner's direction, Pizzi wrote down Russo's home and business telephone numbers (Tr. 29-31, 70, 73).

On January 9, three days after the loan, Pizzi telephoned Russo at work and demanded money. When Russo explained that he had none, Pizzi said that the debt was now $270—the $70 being "interest." Pizzi ordered Russo to bring the money to a bar at 6 p.m. that evening (Tr. 34). Russo borrowed $40 from his father and arrived at the bar about 6:30 p.m. He handed the money to Pizzi, who promptly knocked him to the floor and said, "[t]hat's for being late." Pizzi told Russo: "Now, you think you only owe me two hundred thirty, but you owe me two fifty. You owe me an extra twenty for being late." Pizzi pushed back his coat and revealed a chrome revolver in his waist band. He warned Russo to "[w]atch how you come off the floor" (Tr. 35). Petitioner stood laughing beside Pizzi. Pizzi told Russo that he had to do what he did for petitioner, his partner (Tr. 35-36).

On January 11, a Sunday, Pizzi came uninvited to the Russo home (Tr. 38). He declared that he and petitioner were going to give Russo a "break" which would help him to pay off the debt. Pizzi explained that he and petitioner were taking over the Pink Pussycat, a Passaic,

New Jersey, cocktail lounge. Pizzi said that Russo could earn several hundred dollars by working two nights a week at the lounge and doing work at home using the telephone. Mrs. Russo told Pizzi that the work sounded illegal. Pizzi said that it was, but that he and petitioner had "connections" (later explained to refer to local police) and never got caught. Pizzi told the Russos that he and petitioner were in the money-lending business and that he used a gun to take care of people who got "out of line" (Tr. 38-39, 223-224).

After further meetings, at which threats were made and petitioner was physically abused (Tr. 43, 231), Pizzi telephoned Russo and again demanded money. Russo stated that he did not know where he could get any. When Pizzi mentioned that he managed a gas station in Belleville, New Jersey, Russo suggested that he could work there to pay off the debt. Pizzi agreed and told Russo to come to the station on Saturday, January 17, 1970. When Russo went to the service station on the 17th Pizzi and some other men were there. Pizzi, who was dressed in a sports jacket and slacks, spent the day answering the telephone. Cars kept entering and leaving the station, but no one bought any gas (Tr. 44).

On January 24, at Pizzi's instruction (Tr. 50), Russo went to the Pink Pussycat. Once again he had no money. Pizzi punched Russo, saying that he did it for his partner. While Russo was lying on the floor, an unidentified man came up to Pizzi and said: "You handled that fellow nice, Frank. You did a real nice job on him. I groomed you really good." Then, addressing Russo, the man said: "Frank was in the same jam you are in, and I gave him a shot and he squared himself away with me. Now, you got the same kind of a deal coming to you." Russo was told that he would be allowed to handle "NBHS"—which

the unidentified man said meant numbers, bookmaking, horses, and shylocking—at the plant where Russo worked. Russo told the man he was not interested. Before Russo left, Pizzi told him that the two week old $200 debt had increased to $300 (Tr. 50-51).

The next day, January 25, petitioner telephoned Russo at work and demanded that Russo pay him $400 that evening. Shortly thereafter Pizzi called Russo and threatened to kill him, his wife, and his daughter. Later that day, Russo went to the F.B.I. (Tr. 52-53).

2. Petitioner claims that the summation of the United States Attorney was not based on "the evidence and the legitimate inferences flowing therefrom", but unfairly depicted "the defendant Pizzi (and by association the Petitioner) as sinister criminal elements, undoubtedly part of the organized criminal ring" (Pet. 16-17). The court of appeals, after a "thorough evaluation of the record" concluded that the comments of the prosecutor were "within the bounds of reasonable inference from that evidence" (Pet. App. 4a). The finding is clearly sustained by the evidence detailed above. The comments of the Assistant United States Attorney, cited by petitioner (Pet. 6-8), pertain to the version of the events narrated by the chief witness (the victim of the illicit conspiracy), and deal principally with the possible motive petitioner and Pizzi had to commit the offense: use of the extortionate loan to enlist petitioner as an employee in other illicit activities in which they were engaged at the Pussycat Lounge and at the gasoline station.[1] Petitioner does not claim that this evidence

[1]Petitioner also cites as improper the remark of the prosecutor to the jury that "from these facts, if you find these defendants are guilty * * * [c]ome back and say guilty. That's your job. That's your sworn oath" (Pet. 8). Even when taken out of context, it is difficult to see what was improper about this statement. When viewed in context it is plain that the comment was clearly appropriate, since in the preceding sentence the Assistant United States Attorney told the jury (Pet. App. 24a): "If you find from the facts that these two men are innocent, that the Government didn't prove beyond a reasonable doubt our heavy burden, and its a heavy burden, if we didn't prove it, tell us. Not guilty. Don't be afraid."

was improperly admitted, and it clearly was proper for the prosecutor to argue to the jury from that evidence—in contrast to defense counsel who, the court of appeals found, argued points which were "totally unfounded on the record" (Pet. 5a, n.).

Moreover, no objection was taken to the allegedly improper remarks made by the prosecutor in his summation. Under these circumstances, as Chief Judge Friendly recently wrote in *United States* v. *Briggs*, 457 F. 2d 908, 912 (C.A. 2):

> [A]n appellate court will reverse only if the summation was so "extremely inflammatory and prejudicial," *United States* v. *DeAlesandro*, 361 F. 2d 694, 697 (2 Cir.), cert. denied, 385 U.S. 842, 87 S.Ct. 94, 17 L.Ed.2d 74 (1966), that allowing the verdict to stand would "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936). See also *New York Central R.R.* v. *Johnson*, 279 U.S. 310, 318-319, 49 S.Ct. 300, 73 L.Ed. 706 (1929); *San Antonio* v. *Timko*, 368 F. 2d 983, 986 (2 Cir. 1966).

See, also, *United States* v. *Benter*, 457 F. 2d 1174 (C.A. 2), certiorari denied, 409 U.S. 842.

The summation here, as the court of appeals properly found (Pet. App. 5a), hardly falls within the limited exception to the rule requiring an objection contemporaneously with or immediately after the summation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.